Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

Nos. 99-1566 & 99-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

TEXAS SOUTHERN UNIVERSITY;
BARBARA HAYES; ARUN JADHAV, Doctor,
CURTIS W. MCDONALD; JOSEPH JONES,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
CHANDRA MITTAL, Ph.D.,
Cross-Respondent,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MITTAL'S BRIEF IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION

RICHARD S. LONDON
Counsel of Record
London & Schaeffer, LLP
3118 Richmond, Suite 200
Houston, Texas 77098-3016
(713) 524-7300

Counsel for Cross-Respondent Mittal

Alpha Printing and Law Brief Company, Houston, Texas (713) 270-6604

29pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

CROSS-RESPONDENT'S STATEMENT OF THE CASE 1

REASONS FOR DENYING THE CROSS-PETITION 4

I. TSU'S STATUTORY ARGUMENTS ARE NOT RIPE FOR REVIEW 4

II. STATES ARE "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY 6

A. The Purpose, Subject Matter and Legislative History of the False Claims Act Demonstrate That Congress Intended the Act to Reach States That Submit False Claims 7

B. The Language and Statutory Framework and Executive Interpretation of the False Claims Act Demonstrate that "Person[s]" Include States 12

C. Congress's Clear Intent to Include States as Liable "Person[s]" Under the False Claims Act Should Not Be Overridden ... 18

TABLE OF CONTENTS — Continued

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: **Page**

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) ..... 9 , 14

California v. United States,
320 U.S. 577 (1944) 7, 10, 13

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1981) 6

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 4, 5

Commissioner v. Lundy,
516 U.S. 235 (1996) 17

Edelman v. Jordan,
415 U.S. 651 (1974) 5

Georgia v. Evans,
316 U.S. 159 (1942) 10

Helvering v. Stockholms Enskilda Bank,
293 U.S. 84 (1934) 7

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 11

Hilton v. South Carolina Public Railways Com'n,
502 U.S. 197 (1991) 9

TABLE OF AUTHORITIES — Continued

Page

International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72 (1991) 7

Lorillard v. Pons, 434 U.S. 575 (1978) 15

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 11

Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978) 10

Ohio v. Helvering, 292 U.S. 360 (1934) 7, 10

Plumbers' Union v. Door County, 359 U.S. 354 7

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 4

Sims v. United States, 359 U.S. 108 (1959) 7

Swint v. Chambers County Com'n, 514 U.S. 35 (1995) 4

Thornburg v. Gingles, 478 U.S. 30 (1986) 8

TABLE OF AUTHORITIES — Continued

Page

United States v. Bornstein,
423 U.S. 303 (1976) 20

United States v. Cooper Corporation,
312 U.S. 600 (1941) 6,7,16

United States v. Halper, 490 U.S. 435 (1989),
abrogated in other respects, Hudson v. United States
522 U.S. 1165 (1997) 20

United States v. National Treasury Emp. Union,
513 U.S. 454 (1995) 6

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 8, 16

U.S. ex rel. Foulds v. Texas Tech Univ.,
171 F.3d 279 (5th Cir. 1999) 3, 5

U.S. ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 20

U.S. ex rel. Stevens v. State of Vermont Agency
of Natural Resources, 162 F.3d 195
(2nd Cir. 1998), *cert. granted*, 119 S.Ct. 2391 ..... 3, 17

U.S. ex rel. Wisconsin v. Dean,
729 F.2d 1100 (7th Cir. 1984) 17

TABLE OF AUTHORITIES — Continued

Page

U.S. ex rel. Woodard and State of Colorado v. County View Care Center, Inc., 797 F.2d 888 (10th Cir. 1986) 17

U.S. ex rel. Zissler v. Regents of Univ. of Minnesota, 154 F.3d 870 (8th Cir. 1998) 19

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) 16

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 5, 9

Zemel v. Rusk, 381 U.S. 1 (1965) 12

Statutes:

1 U.S.C. § 1 9

15 U.S.C. §§ 1311-14 15

28 U.S.C. § 1291 4

28 U.S.C. § 2072 4

31 U.S.C. § 380, *et seq.* 18

TABLE OF AUTHORITIES — Continued

Page

31 U.S.C. § 3729(a) 1

31 U.S.C. § 3729(b) 2

31 U.S.C. § 3730(e) 11, 12

31 U.S.C. § 3730(h) 13

31 U.S.C. § 3733 ..... 14, 15

31 U.S.C. §§ 3729-3733 1

41 U.S.C. § 51, *et seq.* 18

42 U.S.C. § 1983 5

Constitution:

U.S. CONST. amend. XI ..... *passim*

Other Authorities:

Bureau of the Census, U.S. Dept. of Commerce, Publication FES/96, Table 11, "Federal Expenditures by State for Fiscal Year, 1996" (1997) 19

TABLE OF AUTHORITIES — Continued

Page

R. Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 *Pub. Contract L.J.* No. 2 (Winter 1995) . . 11

S. Rep. No. 99-212 (1985) 18

S. Rep. No. 99-345 (1986), *reprinted in* 1986 *United States Code of Congressional and Administrative News* 5262. . . . . *passim*

Cross-Respondent Mittal submits this Response to Texas Southern University, Barbara Hayes, Arun Jadhav, Curtis W. McDonald and Joseph Jones (hereafter collectively "TSU") Cross-Petition For a Writ of Certiorari (S.Ct. No. 99-1705). The issue in the cross-petition is whether State-funded institutions that engage in precisely the same kinds of fraudulent conduct affecting the federal treasury as do privately owned entities should be deemed exempt from the definition of "persons" that can be held liable under the 1986 amendments to the Federal False Claims Act. Cross-petitioners ask this Court to grant them such an exemption. They do so notwithstanding Congress's understanding at the time the 1986 amendments were introduced that States already could be held liable under the previous terms of the False Claims Act. And they do so despite Congress's clear intent to continue to hold States liable for fraudulent conduct at the time that it introduced major amendments to the Act in order to significantly strengthen and expand its usefulness as a weapon for fighting fraud against the United States.

CROSS-RESPONDENT'S STATEMENT OF THE CASE

1. The False Claims Act (hereafter "FCA"), 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any "person" who, *inter alia*, knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages which the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the False Claims Act and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring a False Claims Act suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, initiates a suit, by filing a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a written disclosure statement describing all of the information and evidence in the relator's possession relating to the case. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.*, § 3730(b)(3). If the United States intervenes, the action is conducted by the Government. *Id.*, § 3730(b)(4)(A). If the Government does not intervene, the relator has the right to proceed with the action in the Government's name, albeit with significant Government oversight and without the United States ever truly relinquishing control of the litigation. *See Id.*, §§ 3730(c)(2) and (3).

2. Relator Chandra Mittal filed this *qui tam* action under seal on February 21, 1997, in the Southern District of Texas, Houston Division. Mittal alleged that defendants violated the FCA by submitting false claims to the United States through the Research Center in Minority Institutions ("RCMI") program, a division of the National Institutes of Health. Specifically, relator alleged that in violation of applicable laws and regulations, defendants submitted grant applications to the RCMI representing that the faculty hired under the program would become university employees after the funding ended. TSU obtained at least fourteen million dollars of funding under the

RCMI program. TSU then failed to retain the faculty hired, the essential precondition to obtaining the RCMI funds.

3. On June 17, 1997, the United States filed its election to decline active intervention at that time. The District Court unsealed the complaint on June 18, 1997.

After being served with the complaint, defendants moved to dismiss. They contended, first, that the Eleventh Amendment precludes the suit, and, second, that the state is not a "person" under the FCA. The District Court denied defendants' motion on both grounds.

4. Defendants appealed the District Court's order to the Fifth Circuit. The United States intervened in the appeal to defend the constitutionality of the FCA provisions allowing *qui tam* suits as they apply to state defendants.

5. On December 20, 1999, the Fifth Circuit dismissed the appeal, holding that it was controlled by *Foulds*. *U.S. ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) ("when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court."), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 23, 1999) (S.Ct. No. 99-321), *petition for cert. filed*, 68 U.S.L.W. 315 (Aug. 27, 1999) (S.Ct. No. 99-365), *cross-petition for cert. filed*, (Aug. 27, 1999) (S.Ct. No. 99-513); see also *U.S. ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *petition for cert. granted*, 119 S.Ct. 2391 (June 24, 1999) (S.Ct. No. 98-1828), *argued Nov. 29, 1999.*

REASONS FOR DENYING THE CROSS-PETITION

I. TSU'S STATUTORY ARGUMENTS ARE NOT RIPE FOR REVIEW.

Because it relates to a claimed right of immunity from suit, TSU's Eleventh Amendment challenge to the jurisdiction of federal courts to hear claims brought against state entities by *qui tam* plaintiffs under the False Claims Act was properly subject to interlocutory review pursuant to this Court's rulings in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The trial court's determination that States are "persons" subject to potential liability under the Act, however, does not raise an issue that normally would give rise to the right to an immediate appeal.[1] In *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995), this Court held that appellate courts lack discretion "to append to an ... appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." 514 U.S. at 47.[2] While *Swint*

---

[1] States immediately may appeal orders denying claims of Eleventh Amendment immunity because the right to immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Metcalf & Eddy, Inc.*, 506 U.S. at 144. TSU's statutory claim, however, is a defense to *liability*, not an immunity from suit. It thus may be asserted on appeal from a final judgment without loss of any essential benefit of the defense.

[2] The *Swint* Court reasoned that the statutory scheme of 28 U.S.C. §§ 1292(a)-(b) contemplates that *district courts* have "first line discretion" to determine which orders not enumerated in 28 U.S.C. § 1291 or otherwise appealable under *Cohen* are appropriate for interlocutory review; that the Rules Enabling Act empowers the Court to expand the list of orders appealable on an interlocutory basis only through the rule-making process of 28 U.S.C. § 2072 and not through judicial decision; and that "loosely

leaves room to invoke "pendent appellate jurisdiction" to permit appellate review of an otherwise non-appealable ruling that is "inextricably intertwined" with a properly appealable interlocutory order, or that must be decided to ensure "meaningful review" of the issue properly before the court, those circumstances do not exist in this case.

The Eleventh Amendment issue raised in this case is not "inextricably intertwined" with the statutory question decided by the court of appeals. Courts could — and, as the Fifth Circuit properly recognized in *Foulds*, properly *should* — determine the constitutional issue regarding jurisdiction before considering whether States are "persons" under the False Claims Act. If there is no jurisdiction over the claim, there is no proper case before the courts in which to reach non-jurisdictional issues. Similarly, if no Eleventh Amendment impediment to jurisdiction exists in *qui tam* cases against States, there is no compelling need for appellate courts to expand their jurisdiction to include questions of statutory interpretation before final judgment has been entered below. Indeed, this Court has followed precisely such a course of separating Eleventh Amendment jurisdictional questions from statutory interpretation questions in the past. In *Edelman v. Jordan*, 415 U.S. 651 (1974), for example, the Court adjudicated the scope of a State's Eleventh Amendment immunity without addressing whether States are "persons" under 42 U.S.C. § 1983, an issue that the Court only decided fifteen years later. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4 (1989). Moreover, the Eleventh Amendment question is not coterminous with the statutory question, nor does it subsume it. The statutory question is substantially

---

allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 47, 49-50.

broader: TSU's arguments on that question, if accepted, would preclude all False Claims Act suits against state-run entities, including those brought directly by the Attorney General, who clearly is not subject to Eleventh Amendment immunities that justified an interlocutory appeal in this case.

While this Court has adhered in the past to a "*policy* of avoiding the *unnecessary* adjudication of federal constitutional questions," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1981) (emphasis added); *see also United States v. National Treasury Emp. Union*, 513 U.S. 454, 477 (1995), that prudential doctrine presupposes that the Court *has* jurisdiction to review both grounds of decision. Because answering the question whether courts have jurisdiction over a claim is a *necessary* first step in determining whether *any* further issues may be addressed, any policy of addressing statutory questions before non-jurisdictional constitutional matters is irrelevant here.

II. STATES ARE "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY.

TSU asserts that States are not among the "person[s]" that can be held liable under the False Claims Act for defrauding the United States. Specifically, TSU contends that because "person" is not defined in § 3729(a), and — according to TSU — Congress never intended States to be included among those that could be held liable under the Act, neither *qui tam* plaintiffs nor the United States itself can sue States for False Claims Act violations. TSU is wrong.

"[T]here is no hard and fast rule" that the term "person" should be construed to exclude States when it is used in federal statutes. *See United States v. Cooper Corporation*, 312 U.S. 600, 604-05 (1941). Indeed, the term "person" has frequently been held to include States and their political subdivisions even

where Congress did not define the term in a statute. *See, e.g., Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934)("It has been held many times that the United States or a state is a 'person' within the meaning of statutory provisions applying only to persons."); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934)("The state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of a tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."); *California v. United States*, 320 U.S. 577, 585 (1944)(Oakland and California each held to be among "entities other than technical corporation, partnership and associations [that] are included among 'persons'" subject to Shipping Act); *Plumbers' Union v. Door County*, 359 U.S. 354, 359 (1959)("This Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law.").

"[W]hether the word 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. 108, 112 (1959). If the purpose, subject matter, context, legislative history, or executive interpretation of the statute reveal such an intent, States and other sovereigns should be construed to fall within the meaning of the term. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991); *Cooper Corporation*, 312 U.S. at 605.

The "legislative environment" of the False Claims Act leaves no doubt that States are intended to be among the "persons" who can be held liable for defrauding the Federal Government. Every relevant factor leads to that conclusion.

A. The Purpose, Subject Matter and Legislative History of the False Claims Act Demonstrate that Congress Intended the Act to Reach States that Submit False Claims.

The Supreme Court "has repeatedly recognized that the authoritative source of legislative intent lies in the Committee Reports on the bill." *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986). When the False Claims Act was substantially amended in 1986, Congress unequivocally expressed its understanding and intention that the liability provisions of the Act apply to States as well as to any other recipient of federal funds. The Senate Report that accompanied those amendments specifically noted:

> "The False Claims Act reaches *all* parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations ... *as well as States and political subdivisions thereof.*"

S. Rep. No. 99-345, at 8 (emphasis added, internal citations omitted). This statement of the reach of the statute is entirely consistent with the broad remedial purpose of the Act. In addition, the Senate Report "strongly endorse[d]" the opinion offered by the Supreme Court in *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968), that, since its inception, the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." S. Rep. No. 99-345, at 19. Indeed, Congress's primary purpose for overhauling the statute in 1986 was to make it more effective in redressing and deterring fraudulent claims that permeate "all Government programs" ranging from welfare and food stamp benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs, to Medicare and Medicaid programs. *Id.*, at 2-3, 21.

TSU contends that this Court's ruling in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), requires that Congress make its intent "'unmistakably clear in the language of the statute' if it intends to subject a state to liability." TSU Pet. at 13, *quoting Will*, 491 U.S. at 65. In fact, no such broad-based restriction has ever been imposed on Congress. TSU conveniently omits key language from its quotation which demonstrates that *Will*'s discussion of the "clear statement" rule is a mere reference to the uniquely high standard for abrogating the Eleventh Amendment that was established in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).[3] Read in their entirety, the relevant passages of *Atascadero* and *Will* plainly limit the requirement that congressional intent be unmistakably clear "in the language of the statute" to circumstances in which Congress intends *"to alter the 'usual constitutional balance* between States and the Federal Government.'" *Will*, 491 U.S. at 65, *quoting Atascadero*, 473 U.S. at 242 (emphasis added). Indeed, this Court has expressly disavowed the notion that *Will* extended the requirement set forth in *Atascadero* to apply where the issue to be determined is one of statutory construction and not one of altering the constitutional balance between States and the Federal Government. *See Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 205-206 (1991).

The *qui tam* provisions of the False Claims Act do not "alter the usual constitutional balance between States and the Federal Government." Whether it initiates a suit itself or permits a *qui tam* plaintiff to proceed on its behalf, the United States is *always* the real party in interest in False Claims Act

---

[3] See also *Atascadero*, 473 U.S. at 253-54 (Brennan, J., dissenting)(majority in *Atascadero* creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

action and, since the inception of the Union, has had the inherent right to sue States for violating federal law. There is thus no basis to limit the means of ascertaining Congress's intent with respect to potential State liability under the Act to "unmistakably clear" language in the text of the Act itself.

TSU also errs in suggesting that Congress was mistaken in its understanding of the reach of the False Claims Act prior to its 1986 amendments. This argument ignores the three Supreme Court cases cited in Senate Report No. 99-345 in support of the conclusion that the False Claims Act applies to States. While the cited cases were not False Claims Act decisions, each holds that, where appropriate to fully implement the remedial purposes of an act, the term "person" is properly construed to include States and their political subdivisions. *Ohio v. Helvering*, 292 U.S. at 370 (a State is a liable "person" where its activity in selling liquor brings its conduct within area of concern of federal statute); *Georgia v. Evans*, 316 U.S. 159, 161-62 (1942)(state victim is a "person" under terms of the antitrust laws where harm it suffers from an antitrust violation is the same as that suffered by private persons); *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978)(local governments are accountable "persons" under § 1983 where they violate the policies underlying that act). In light of the False Claims Act's broad-based objective of fighting *all* types of fraud against the United States, the cases cited in the Senate Report fully support application of the term to cover any state entity that engages in such misconduct. Indeed, this Court has concluded that States *must* be considered "persons" within the meaning of a statute if "its plain purposes preclude their exclusion." *California v. United States*, 320 U.S. at 585.

TSU also asserts that Senate Report No. 99-345 is irrelevant with respect to the meaning of "person" because it does not describe the 1986 amendments but is rather part of the Report's description of the history of the Act. First, as noted

above, in light of the broad remedial purposes that have always formed the foundation of the False Claims Act, Congress's interpretation in 1986 of the prior reach of the Act is entirely sound. More fundamentally, however, TSU is simply wrong in asserting that Congress's understanding of the scope of the Act at the time it substantially amended the statute is unimportant. In fact, that understanding and how Congress chose to act in light of it are controlling.

In 1986, Congress dramatically reworked the FCA so as to maximize its effectiveness in fighting fraud.[4] As part of its overhaul of the Act, Congress made adjustments to the very provision of the Act at issue here — which persons might be held liable for fraud — by narrowing the exclusion that had previously existed for members of the armed forces and by adding new exclusions (under some circumstances) for Members of Congress, members of the Judiciary, and senior executive branch officials. *See* Senate Report No. 99-345, at 39, 43; 31 U.S.C. § 3730(e). Although it obviously could, Congress did not provide any similar sort of exclusion for States. That decision is significant.

This Court has noted repeatedly that where, in making major changes to a statute, Congress does not seek to overturn an interpretation it knows the courts have applied to retained provisions of pre-existing legislation, it can be inferred that Congress has ratified the courts' interpretation of that aspect of the law. *See, e.g., Herman & MacLean v. Huddleston*, 459

---

[4] Beginning in 1985 and ending in 1986, Congress undertook a major overhaul of the False Claims Act, covering both the substantive and the *qui tam* provisions." Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 *Pub. Contract L.J.* No. 2 (Winter 1995), 250 (citations omitted). See also S. Rep. No. 99-345, *passim*.

U.S. 375, 385-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982). A similar inference has been drawn where, in substantially reenacting laws, Congress did not seek to overturn prior administrative interpretations of existing provisions. *See, e.g., Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). There is no reason to afford any less weight to Congress's decision to leave intact its *own* interpretation of the reach of a statute that it has comprehensively reviewed and has otherwise substantially amended.

When Congress overhauled the False Claims Act in 1986, it specifically addressed the definition of liable "persons" under the Act and reaffirmed the inclusive reach of that term. The intent of Congress in 1986 is manifest and controlling.

B. The Language and Statutory Framework and Executive Interpretation of the False Claims Act Demonstrate that "Person[s]" Include States.

The explicit reference to States and their political subdivisions in the Senate Report coupled with the broadly-stated purpose of the Act to reach *all* fraud against the United States are the clearest indication of congressional intent to hold States liable for any fraud they commit. They are by no means, however, the only aspects of the "legislative environment" of the False Claims Act that support that conclusion. Congress's intent to define "person" to include States is evidenced as well by the text and statutory framework of the Act.

As noted above, although the amended statute specifically provides certain categories of persons partial exclusions from liability, *see* 31 U.S.C. § 3730(e)(relating to certain *qui tam* actions), it does not include States or their political subdivisions among the excluded groups. Moreover, the narrow limitations

Congress placed on the exclusions it granted military personnel and certain high-ranking federal officials[5] to False Claims Act liability serve only to underscore the breadth of the Act. If Congress was willing, with only limited restrictions, to extend False Claims Act liability to members of the military, Members of Congress, members of the Judiciary, and senior executive branch officials in the Federal Government, there is no reason to presume that it intended to give States and their political subdivisions any greater leeway in defrauding the Federal Government.

Congress's intent to protect the federal treasury from *any* individual or entity that would advance fraud against the federal government is evident as well by its stated intent to include States and their political subdivisions among "employers" that could be held liable under the 1986 amendments for retaliating against their employees for taking lawful action to expose and remedy False Claims Act violations. *See* 31 U.S.C. § 3730(h). The Senate Report that accompanied the 1986 amendments explained that the definitions of "employee" and "employer" under the new whistleblower protection provisions of the FCA were meant to be *"all-inclusive"* and that the term "employers" was meant to include *"public* as well as private sector entities." S. Rep. No. 99-345, at 34-35 (emphasis added). *Cf. California v. United States*, 320 U.S. at 586 (holding that legislative history stating that the Shipping Act should apply "no less [to] public

---

[5] The exclusion for members of the armed forces relates only to actions brought against them by other former or present members of the armed forces for claims arising out of service in the armed forces. *See* 31 U.S.C. § 3730(e)(1). Members of Congress and members of the judiciary are immune only from *qui tam* actions. *Id.*, § 3730(e)(2). And senior executive branch officials are granted an exclusion only with respect to *qui tam* actions that are "based on evidence or information already known to the Government when the action was brought." *Id.*

than [to] private owners" of waterfront terminals shows congressional intent to hold cities and States accountable under that act).[6]

The provision of the False Claims Act that was added in 1986 to authorize civil investigative demands ("CIDs") likewise confirms that Congress contemplated that States and their political subdivisions could be held liable for fraud under the statute. In 31 U.S.C. § 3733(l)(4), "person" is defined to include "any State or political subdivision of a State." While TSU has argued that the inclusion of the phrase "[f]or purposes of this section" at the beginning of the definitions set forth in § 3733(l) indicates that Congress intended the definition of "persons" to be different for CIDs than for the liability provisions of the Act, *see* TSU Pet. at 8-9, the legislative history of § 3733 shows that precisely the opposite is true.

In explaining the CID provisions that were added to the False Claims Act in 1986, Senate Report No. 99-345 notes that the provisions of § 3733 are "nearly identical" to CID authority that had already been granted the Antitrust Division of the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and that it was intended that "the legislative history and case law interpreting that statute (15

---

[6] While this Court held in *Atascadero*, 473 U.S. at 244, that — to effect any necessary abrogation of Eleventh Amendment immunity that might apply to individual's personal suits against States — Congress must clearly specify in the language of the statute itself its intent to affect such abrogation, no such restriction can properly be imposed on where Congress may effectively demonstrate its intent for purposes of deciding the broader question of whether Congress understood and intended to include state entities among those who could be liable to the United States for fraud under the False Claims Act. *See, e.g., Atascadero*, 473 U.S. at 253-54 (Brennan, J., dissenting)(majority in *Atascadero* creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

U.S.C. [§§] 1311-14), fully apply to this bill." *Id.*, at 33. Where Congress explicitly intends precedent interpreting one statute to control another, its decision to have the language in the newer bill track that of the older law as closely as possible is only prudent. Moreover, where Congress has announced such an objective, substantive variations from the prior statute that are introduced in the new law must be understood to indicate areas in which Congress intended to deviate from the standards that apply under the older statute. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 581-82 (1978)(noting importance in ascertaining legislative intent of examining where Congress incorporated the text of an older statute verbatim and where it made changes to the language that had been used in the prior legislation).

It is thus noteworthy that one of the ways that the CID provisions of the False Claims Act deviate substantively from their antitrust predecessor is their inclusion of States and States' political subdivisions within the definition of the term "person." Because antitrust CID law does not include state entities within its definition of a "person," Congress's specific decision to add States and their political subdivisions to definition of "person" in § 3733 *conforms* — rather than distinguishes — the use of that term in § 3733 to Congress's understanding of the term "person" in the liability provisions of the Act.[7]

---

[7] The intended connection between the CID section of the False Claims Act and pre-existing antitrust legislation also clarifies why Congress included the phrase "[f]or purposes of this section" as an introduction to the definitions contained in § 3733. The phrase tracks the substantively identical passage introducing definitions in the chapter of the Antitrust Act dedicated to CIDs, *see* 15 U.S.C. § 1311, and thus simply carries forward Congress's stated plan to model the language and meaning of the FCA's new CID provisions wherever possible directly upon the language used in their antitrust predecessor.

An additional weakness of TSU's analysis regarding how to interpret Congress's decision to include a definition of "person" in the CID provisions of the False Claims Act is the fact that the term is used within those provisions to refer both to "person[s]" to whom CIDs might be served and to "person[s] . . . engaged in any violation of a false claims law." *See* 31 U.S.C. 3733(l)(2). Section 3733(l)(2) defines the term "false claims act investigation" as "any inquiry conducted by any false claims act investigator for purposes of ascertaining whether any *person* is or has been engaged in any violation of a false claims law." (Emphasis added.) Thus, read in its entirety, § 3733 indicates that States and their political subdivisions may be both recipients of CID requests and entities whose knowing submission of false claims to the United States can result in liability under the FCA. Such a reading of § 3733 is consistent with Senate Report No. 99-345 and with the broad remedial purpose of the Act to reach "all types of fraud, without qualification, that might result in financial loss to the Government." *Id.*, at 19; *Neifert-White Co.*, 390 U.S. at 232.

In contrast, to sustain TSU's position, this Court would need to conclude that Congress "got it wrong" twice — first, when it stated in the legislative history of the False Claims Act that it intended to include States among the "persons" whose fraud could be remedied under the Act, and again when it included the term "person" in its definition of a "false claims law investigation" under § 3733. Where rational alternatives exist, this Court should not adopt a reading of a statute that assumes that Congress was sloppy or ill-informed. In interpreting the law, it is the role of courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991).

Other aspects of the "legislative environment" demonstrate as well that Congress intended to include States in the definition of a "person." In addition to using the term to define who can

be held liable under the Act and to whom CID requests might be directed, the False Claims Act also uses the term "person" to define who is eligible to act as a *qui tam* plaintiff in such actions. No one denies States' right to act as *qui tam* relators under the Act. *See, e.g., U.S. ex rel. Woodard and State of Colorado v. County View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986); *U.S. ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *see generally Stevens*, 162 F.3d at 204-05. Indeed, when the 1986 Amendments were drafted, Congress expressly acknowledged that fact and acted upon the request of the National Association of Attorneys General to overrule a lower court ruling that the States believed unduly restricted their ability to bring *qui tam* suits under the Act. *See* S. Rep. No. 99-345, at 12-13. "Identical words used in different parts of the same statute are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 249 (1996). Having successfully urged Congress to strengthen their standing as "persons" for purposes of reaping the rewards of filing *qui tam* actions under the False Claims Act, it is disingenuous for States now to argue that the one and only time they should be excluded from the definition of a "person" in the False Claims Act is when the term is used to refer to those who may be held responsible for having defrauded the Federal Government.

A final factor favoring inclusion of States within the definition of "person" under the Act is the fact — evidenced by its intervention and position on this and other appeals — that the Department of Justice has consistently interpreted the statute in that manner. *See Cooper Corporation*, 312 U.S. at 605 (listing "executive interpretation of the statute" among the relevant considerations). To exclude States from the reach of the Act would dramatically undermine the ability of the United States to protect the federal treasury. A more sensible and sound reading of the statute is that Congress intended the False Claims Act to ferret out and fight fraud against the United States wherever it occurs.

C. Congress's Clear Intent to Include States as Liable "Person[s]" Under the False Claims Act Should Not Be Overridden.

In light of the overwhelming evidence that Congress intends False Claims Act liability to extend to the wrongdoing of States and state entities, the other arguments TSU offers in support of its position are entitled to no weight. It is irrelevant that, in passing the Program Fraud an Civil Penalties Act ("PFCPA") and the Anti-Kickback Act of 1986,[8] Congress elected to include a definition of "person" that does not include States. *See* TSU Pet. at 11. Although the PFCPA provides an administrative compliment to the False Claims Act, it was not intended to be co-extensive with it. *See* Senate Report 99-212, at 4-5, 34 (1985)(PFCPA procedures for adjudicating program fraud claims apply only to "small-dollar" claims; larger dollar claims "should be prosecuted in court" under the FCA). Thus, far from suggesting that courts are free to ignore Congress's stated intent that False Claims Act liability should extend to States, the fact that a narrower definition was added to the text of PFCPA merely confirms the more limited circumstances in which Congress believed reliance on administrative procedures was appropriate. Likewise, the fact that the definition of "person" under the Anti-Kickback Act is narrower than under

---

[8] The PFCPA permits federal agencies that are victims of false claims to proceed administratively to recover damages where the amount in controversy is less than $150,000 and where the Department of Justice has elected not to pursue the matter in federal court under the provisions of the False Claims Act. *See* 31 U.S.C. § 380, *et seq.* The Anti-Kickback Act of 1986 makes it unlawful for government contractors to pay, solicit, or charge the Federal Government for kickbacks associated with the bidding or performance of federal government contracts *See* 41 U.S.C. § 51, *et seq.*

the False Claims Act provides no basis whatsoever to ignore the clear statement of congressional intent that States may be held liable under the broader provisions of the FCA.[9]

TSU argues that it is "not sound public policy to burden blameless taxpayers" with rewards under the FCA. TSU Pet. at 7-8. However, it would be poor public policy to allow the States to loot the Federal treasury at will. Fraud consumes as much as ten percent of the Federal budget, up to $100 billion annually. S. Rep. No. 345, at 3, 1986 U.S.C.C.A.N. at 5268. Federal grants to state and local governments more than doubled from $108 billion in 1987 to $228 billion in 1996. *U.S. ex rel. Zissler v. Regents of Univ. of Minnesota*, 154 F.3d 870, 874 (8th Cir. 1998), *citing* Bureau of the Census, U.S. Dept. of Commerce Publication FES/96, Federal Expenditures by State for Fiscal Year 1996 at 46, Table 11 (1997). The dollar cost of state fraud runs in the billions. The cost of exempting the States from the enforcement reach of the False Claims Act will continue to rise with the reality of increasing Federal grants to the States. Furthermore, fraud undermines public confidence in the Federal government. S. Rep. No. 345, at 3, 1986 U.S.C.C.A.N. at 5268. TSU protests that forcing state taxpayers to repay fraudulently obtained grants is against public policy. By implication, TSU's argument is that forcing the Federal taxpayer to subsidize their fraud is acceptable. Clearly, it is not. Allowing fraud to run unchecked is poor public policy in general.

---

[9]Section 1 of the United States Code-Rules of Construction also requires no different result. The definition of "person" included in 1 U.S.C. § 1 is one to be used by default only where the context of a particular statute does not indicate otherwise. The Supreme Court has never applied that section to override a different definition of the term that the "legislative environment" shows Congress intended to apply with respect to a specific statute.

Nor can the reluctance TSU attributes to courts with respect to imposing punitive damages on States justify overriding Congress's intent to include them among the "persons" subject to the False Claims Act. As this Court has previously discussed at length, the multiple damages and civil penalty provisions of the False Claims Act are not "punitive damages" but rather "rough remedial justice." *United States v. Halper*, 490 U.S. 435, 446 (1989), *abrogated in other respects, Hudson v. United States*, 522 U.S. 1165 (1997); *see also United States v. Bornstein*, 423 U.S. 303, 314-15 (1976)(purpose of FCA remedies is to make government completely whole); *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551-53 (1943)(same). There is no basis to override Congress's manifest intent to treat state institutions the same as any other entity that knowingly defrauds the United States.

CONCLUSION

For all the reasons set forth above, TSU's Conditional Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted.

RICHARD S. LONDON
Counsel of Record
London & Schaeffer, LLP
3118 Richmond, Suite 200
Houston, Texas 77098-3016
(713) 524-7300

Counsel for Cross-Respondent Mittal

May, 2000